IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.833 OF 2004

Prema Sadanand Shetty ...Appellant

Vs.

Mumbai Municipal Corporation
of Greater Mumbai ...Respondent

Mr.Vineet Naik with Bharat Joshi for the Appellant
Mr.M.D.Patil for Respondent-Corporation.

CORAM: A.S.OKA, J.

DATE : AUGUST 30, 2004.

JUDGMENT:

1. Admit. Printing is dispensed with. The learned Counsel for the Respondent waives service. Considering the facts and circumstances of the case First Appeal is forthwith taken up for final hearing.

2. The Appeal is filed by the original Plaintiff. The challenge is to the order dated 8th February 2001 passed by the learned Judge of the City Civil Court, Mumbai in Contempt Notice of Motion No.346 of 2001 in L.C.Suit No.3778 of 2000. By the said order the said Notice of Motion taken out by the respondent/Defendant Mumbai Municipal Corporation was made absolute by holding that the Appellant has committed breach

of order of status quo passed by the Trial Court on 17th July 2000. The Notice of Motion appears to have been filed under Rule 2-A of Order XXXIX of Code of Civil Procedure, 1908 (hereinafter referred as the said Code). The Trial Court held that the Appellant was guilty of Contempt of Court under Order XXXIX Rule 2-A of the said Code. The Appellant was directed to pay costs of Rs.5000/- to the Respondent-Corporation and the L.C.suit No.3778 of 2000 filed by the Appellant was dismissed.

3. The learned Counsel appearing for the Appellant submitted that the Appellant has not committed any breach of order of status quo passed by the Trial Court. He submitted that even assuming that there is some breach on the part the Appellant, it is obviously unintentional. He pointed out the finding recorded by the Trial Court that status quo has been altered by fixing the stall board and by making a flower bed. He submitted that there is no finding recorded by the Trial Court that the alleged breach of the order on the part of the Appellant was deliberate and wilful. He submitted that an opportunity of being heard was not given to the Appellant before taking up the suit on Board and before dismissing the same. The learned Counsel relied upon the Affidavit dated 25th August 2004 filed by the Appellant in this Court.

4. Shri Patil for the Respondent supported the impugned Judgment and Order by pointing out that after obtaining order

of status quo the Appellant has committed gross breach of the said order of the Court. He submitted that from the facts which are brought on record it is clear that the breach is a wilful breach.

5. I have considered the rival submissions. By order dated 17th July 2000 passed by the trial Court in Notice of Motion No.3647 of 2000 both the parties were directed to maintain status quo with regard to the suit property till the disposal of the said Notice of Motion. The Respondent-Corporation has filed Contempt Notice of Motion No.346 of 2001. In an Affidavit in support of the said Notice of Motion one Sanjay Appu Waghamare, Officer of the Respondent stated as under :

> . "I submit that this Hon'ble Court was pleased to pass the order of status quo on 14.7.2000.
>
> . I submit that again the site was inspected on 28-11-2000 by the staff of the Ward Office when they directed that structure was completed. I submit that the photographs of the said unauthorised construction was taken on 28-11-2000. I crave leave to refer to and rely upon the Photographs of the said structure as and when produced.
>
> . I respectfully submit that the respondent was violated the order of status quo passed by this Hon'ble Court by carrying out additions and alterations of the suit structure."

It is obvious that no material particulars of the alleged violation of the order on the part of the Appellant/Plaintiff were set out in the Affidavit.

6. The allegation made in the Contempt Notice of Motion was denied by the Appellant by filing Affidavit-in-reply. The learned Trial Judge in the impugned Order has recorded the following finding :

> . "... However, the premises of the Plaintiff is altered in all parts as seen from the photograph. the stallboard or name board has come up which is not depicted in the photograph of 28-6-2000. The flower beds have come up to the end of the premises of the Plaintiff which are not seen on 28-6-2000. The painting is completed and the other aspects are admitted by the Plaintiff. That what was completed was only internal aspect of wiring and nothing else because according to Mr.Joshi all the aspects of plastering, furnishing and electrical work was completed before 28-6-2000..."

The learned Trial Judge further observed that,

> . "... Mr.Joshi argued that there is no averment in the affidavit in support of Notice of Motion for Contempt as to what was the existing situation on that date and what are the alleged chances made by the Plaintiff. The averments in the Affidavit, denials thereof are not to be considered worthwhile if the photographs tell a totally different story...."

7. In the light of what is stated by the learned Trial Judge it will be necessary to refer to the provisions of Order XXXIX Rule 2-A of the said Code. Order XXXIX Rule 2-A provides that in the case of disobedience of any order of injunction passed by the Court, the Court granting the injunction or making the order has power to order that the property of the person guilty of disobedience be attached.

The Court has also a power to detain such a person in civil prison. By the said provision no power is conferred on the Civil Court to strike out the defence of such person or to dismiss the suit filed by such person. The power to dismiss the suit is provided in Rule 11 of Order XXXIX of the said Code which reads thus :

> "11. Procedure on parties defying orders of Court, and committing breach of undertaking to the Court-
>
> (1) Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits any default in respect of or contravenes such order commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the Plaintiff or the applicant, or strike out the defences, if the default or contravention or breach is committed by the defendant or the opponent.
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> (2) The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court:

8. If the Affidavit in support of the Contempt Notice of Motion is perused it is very clear that there are no averments in the Affidavit in support as to what was the position of the suit property on the date on which order of

status quo was passed. and what was the exact contravention made by the Appellant. If the Trial Court was to record a finding of disobedience on the part of the Appellant, a detailed enquiry was necessary to find out as to what was the exact status quo prevailing when the order of status quo was passed and what was the position when Contempt Notice of Motion was filed. What is stated in the impugned order is that the stall board has come up and there is floor bed which is seen from the photograph. The order of status quo which is passed will have to be read in the context of the prayer made in the Notice of Motion for injunction filed by the Appellant. Before holding the Appellant guilty under Rule 2-A Order XXXIX of the Code, the learned Judge ought to have recorded a clear finding as to what was the status quo as operating on 17th July 2000 and what were the breaches committed by the Plaintiff.

9. Even assuming that there is any breach committed by the Appellant of the order of status quo, the order of dismissing the suit could not have been passed. Rule 11 of Order XXXIX confers power to dismiss a suit if the Plaintiff commits breach of order passed by the Civil Court. The scope of power under Rule 11 of Order XXXIX has been decided by the Division Bench of this Court in a Judgment reported in 2004 (2) Mh.L.J. page 1 (Ramavatar Vs. Mulchand). After considering the law on the point and especially the Judgment of the Apex Court in the case of M/s.Babbar Sewing Machine

Co. Vs. Tirlok Nath Mahajan reported in A.I.R. 1978 page No.1436, the Division Bench held in paragraph No.11 of the Judgment that,

> . "Applying the aforesaid observations and reasoning of the Supreme Court in M/s Babbar Sewing Machine Co. with regard to Order 11, Rule 21 of the Code of Civil Procedure and Bimal Chand Jain with regard to Order 15, Rule 5 of the Code of Civil Procedure as amended in UP, in our considered opinion, the provision contained in sub-rule (1) of Rule 11 of Order 39 applicable in Maharashtra is directory and we hold accordingly. The view taken by the two learned Single Judges in Ratnakar D. Patade and Smt.Asha M. Joshi to the effect that Order 39 Rule 11(1) of Code of Civil Procedure is mandatory cannot be held to be laying down the correct position of law and we overrule the said decisions."

In paragraph No.8 of the Judgment Division Bench has referred to the ratio laid down in the case of Babbar (supra) and held that,

> . "In other words, the power of dismissal of suit or striking out the defence, as the case may be, under Order 39, Rule 11(1) of Code of Civil Procedure should be exercised for adequate reasons; where the defaulting party fails ultimately in complying with the order of the Court or undertaking; where the default is wilful and the conduct of the defaulting party contumacious and that results in causing substantial or serious prejudice to the opposite party..."

10. Thus, it is very clear that power under Rule 11 of Order XXXIX cannot be mechanically invoked in every case whenever the court finds that there is a default in complying with the order of the Court. The power to dismiss the suit can be

invoked only if the default is wilful and the conduct of the Plaintiff is contumacious which results in causing substantial prejudice to the opposite party. There is no finding recorded by the learned Trial Judge that the default is wilful. In absence of any such finding the suit filed by the Appellant could not have been dismissed.

11. In the Affidavit dated 25th August 2004 filed in this Court the Appellant has stated that,

> . "Without prejudice, I submit that I am ready and willing to remove flower bed outside the premises and also the Display board on the direction of the Court. I annex copies of a photograph taken as on today showing the position of the flower bed and display board outside the suit premises."

The aforesaid statement is accepted.

12. In view of the foregoing discussion and in view of the statement made in the Affidavit, the impugned order will have to be quashed and set aside and the suit and Notices of Motion filed by both the parties will have to be remanded to the trial Court for deciding the same in the light of observations made by this Court.

13. Hence I pass the following order :

i) The impugned Judgment and Order is quashed and set aside. L.C.Suit No.3778 of 2000, Notice of Motion No.2647 of 2000

and Contempt Notice of Motion No.346 of 2001 are restored to file.

ii) The learned Trial Judge will hear and decide both the said Notices of Motion together. The learned Trial Judge will give an opportunity to the parties to lead evidence in so far as Contempt Notice of Motion No.346 of 2001 is concerned.

iii) The Contempt Notice of Motion shall be decided by the learned Trial Judge in the light of observations which are made in this Judgement.

iv) In view of the statement made by the Appellant in his Affidavit dated 25th August 2004 filed in this Court the Appellant is directed to remove the flower bed outside the suit premises and to remove the display board within a period of two weeks from today. It is made clear that if the flower bed and display board is not removed by the Appellant within the stipulated period, the said conduct of the Appellant shall be considered by the Trial Court while deciding the said Notices of Motion.

v) There will no order as to costs.

vi) Parties to act upon an ordinary copy of this order duly authenticated by the Court Sheristedar.

JUDGE.